Supreme Court, U.S.
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In The

# Supreme Court of the United States

DWIGHT B. LEWIS,

*Petitioner,*

v.

T.C. PETERSON, WARDEN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Bousley v. United States*, 523 U.S. 614, 624 (1998), this Court held that a petitioner for habeas corpus relief who failed to challenge his guilty plea on direct appeal may attack the plea as constitutionally invalid on collateral review if the petitioner can show not only his actual innocence of the charge to which he pled guilty, but also his actual innocence of any "more serious" charge the government has forgone in the course of plea bargaining. The question presented is:

Under *Bousley*, whether a prior, forgone 18 U.S.C. § 924(c) is "more serious" than a subsequent § 924(c) charge, and thus a petitioner who is actually innocent of the § 924(c) charge to which he pled guilty must also establish his actual innocence of a previous § 924(c) charge relating to earlier conduct that the government has forgone in a plea agreement.

TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF FACTS | 3 |
| REASONS FOR GRANTING THE PETITION | 8 |
| CONCLUSION | 12 |

# TABLE OF AUTHORITIES

Page

CASES:

*Bailey v. United States*, 516 U.S. 137 (1995)..... 3, 5, 6, 11

*Bousley v. United States*, 523 U.S. 614 (1998)..... *passim*

*United States v. Johnson*, 260 F.3d 919 (8th Cir. 2001)..... 3, 7, 8, 9, 11

STATUTES AND RULES:

18 U.S.C. § 924(c)..... *passim*

18 U.S.C. § 924(c)(1)..... 2, 6, 10

21 U.S.C. § 841(a)(1)..... 4, 5

28 U.S.C. § 1254..... 1

28 U.S.C. § 2241..... 1, 6, 7

28 U.S.C. § 2253..... 5

28 U.S.C. § 2255..... 5, 6

## PETITION FOR A WRIT OF CERTIORARI

Dwight B. Lewis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App. 1) is reported at 329 F.3d 934 (7th Cir. 2003). The district court's order is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on May 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241 provides in relevant part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless –

* * *

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.

18 U.S.C. § 924(c)(1) (1994), provided:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence

> or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

## STATEMENT OF FACTS

The critical facts relevant to this petition for certiorari are procedural and involve a conflict between two circuits. Pursuant to a plea bargain, Dwight B. Lewis pled guilty and was sentenced for using and carrying a firearm to commit a drug crime in violation of 18 U.S.C. § 924(c). There is no dispute that Lewis is actually innocent of that charge. This is because subsequent to his plea, this Court held in *Bailey v. United States*, 516 U.S. 137, 150 (1995), that for a defendant to be guilty under § 924(c), he must "actively employ" a firearm "during and in relation to" the predicate crime, which Lewis did not do. Lewis then filed a motion for relief in the Seventh Circuit challenging his conviction on collateral review. But both the district court and then the court of appeals denied his petition on the ground that under *Bousley v. United States*, 523 U.S. 614 (1998), Lewis had to prove his actual innocence of an earlier, forgone § 924(c) charge, which he was unable to do. However, had Lewis filed his petition in the Eight Circuit – the circuit in which he pled guilty – his petition would have been granted under that court's decision in *United States v. Johnson*, 260 F.3d 919, 921 (2001) (per curiam). There is a conflict between the Seventh and Eighth Circuits which must be resolved.

By way of background, on December 13, 1994, the government filed a six-count indictment against Lewis in the District Court of Nebraska. The indictment charged

Lewis with various drug and gun-related crimes. The various counts and the conduct underlying them is as follows:

1. On May 14, 1994, Lewis and a woman were inside a parked vehicle when a police officer approached and asked them to step out of the vehicle. The officer searched the vehicle and found a firearm in the backseat and cocaine in the trunk. As a result, Count I charged Lewis with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), and Count II charged Lewis with using and carrying a firearm to commit the drug offense charged in Count I in violation of 18 U.S.C. § 924(c).

2. On July 28, 1994, the police arrested Lewis at his residence. The police found a firearm in a bedroom of Lewis' residence and cocaine outside of Lewis' residence. As a result, Count III charged Lewis with possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a)(1), and Count IV charged Lewis with using and carrying a firearm to commit the drug offense charged in Count III in violation of 18 U.S.C. § 924(c).

3. On September 19, 1994, the police arrested Lewis for possession of 3.5 grams of crack cocaine. As a result, Count V charged Lewis with possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a)(1).

4. On October 30, 1994, the police arrested Lewis for possession of 10.17 grams of crack cocaine. Count VI charged Lewis with possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a)(1).

Pursuant to a plea agreement, Lewis pled guilty to Count III, possession with intent to distribute crack cocaine in violation of § 841(a)(1), and Count IV, using and carrying a firearm to commit the drug offense to commit a federal drug offense in violation of § 924(c). Although he did not plead guilty to Counts I, V and VI, Lewis stipulated that the district court could consider these three charges at sentencing as relevant conduct. The government agreed to dismiss the earlier § 924(c) charge in Count II, and also agreed that the district court could not consider the forgone § 924(c) charge as relevant conduct.

The district court sentenced Lewis to one hundred forty months imprisonment for Count III, and sixty months imprisonment for Count IV – the latter § 924(c) charge – to be served consecutively to Count III. The district court further imposed a five year term and a three year term of supervised release for Counts III and IV, respectively, and it ordered Lewis to pay a $100 special assessment.

Lewis did not pursue a direct appeal. Following this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), Lewis, acting pro se, moved the Nebraska District Court to permit him to file a direct appeal. The court denied that motion. Lewis then filed a motion pursuant to 28 U.S.C. § 2255 arguing that his conviction of Count IV for using and carrying a firearm to commit the charged drug offense in violation of § 924(c) should be vacated in light of *Bailey*. But the Nebraska District Court denied that motion as well, and the Eighth Circuit subsequently denied Lewis' application for a Certificate of Appealability pursuant to 28 U.S.C. § 2253 without comment on January 12, 1998.

Shortly after this Court held in *Bousley v. United States*, 523 U.S. 614 (1998), that *Bailey* applied retroactively to cases on collateral review, Lewis filed a petition under 28 U.S.C. § 2241 in the district court for the Central District of Illinois (the district in which Lewis was incarcerated). Lewis argued that his conviction in Count IV for violating § 924(c)(1) was illegal in light of the Court's decision in *Bousley*. The Illinois District Court ordered the government to show cause why Lewis' § 2241 Petition should not be granted. The government filed its response, and the district court denied Lewis' petition on July 12, 2000.

In denying Lewis' Petition, the Illinois District Court assumed that § 2255 was inadequate and ineffective, and thus it turned to the merits of Lewis' § 2241 claim. App. 12. The district court concluded that Lewis was factually innocent of the § 924(c) charge to which he pled guilty and was sentenced to 60 months imprisonment. App. 13. However, the district court determined that Lewis must also establish his actual innocence of the earlier § 924(c) charge that was dismissed pursuant to the plea agreement. App. 14. The district court never considered whether an earlier § 924(c) weapons charge was "more serious" than the later § 924(c) for which he was factually innocent. Instead, the district court found that Lewis was unable to prove his factual innocence of the foregone § 924(c) charge, and it denied his petition. App. 16.

The Seventh Circuit appointed counsel to represent Lewis on appeal. It directed counsel to two issues: (1) whether Lewis was entitled to proceed under 28 U.S.C. § 2241, and (2) whether under *Bousley* "a § 924(c) charge that was dismissed as part of a plea agreement was 'more

serious,' and if so, is Lewis actually innocent of the dismissed § 924(c) charge?" App. 6-7.

The court of appeals readily found that Lewis' petition under § 2241 was proper: "the combined effect of *Bailey* and *Bousley* is to establish that [Lewis] was convicted of a non-existent crime, a consequence that, as the *Bousley* decision makes clear, is a ground for collateral relief." App. 3. It then turned to the merits of Lewis' petition for relief.

The court of appeals noted that Lewis was entitled to relief under the Eighth Circuit's decision in *United States v. Johnson*, 260 F.3d 919, 921 (2001) (per curiam). Lewis was convicted of a non-existent crime, and under the Eighth Circuit's decision in *Johnson*, "because the dropped offense occurred first, and a later offense cannot be used to enhance the punishment for an earlier one, the 'more serious' criterion of *Bousley* has not been met." App. 4.

The court of appeals, however, "disagree[d] with *Johnson's* reading of *Bousley*." *Id.* Judge Posner wrote (App. 4-5) (emphasis added):

> The logic of the *Bousley* opinion does not require that the charge that was dropped or foregone in the plea negotiations be more serious than the charge to which the petitioner pleaded guilty. *It is enough that it is as serious.* For if it is as serious, the petitioner would have gained little or nothing had the government and he realized that the charge to which he pleaded guilty was unsound. Had they realized this they would have switched the plea to the sound charge, and as long as it was an equally serious charge, as it was here, the punishment would probably have been the same, subject to our earlier acknowledgment that the government might drive a

> harder plea bargain if it had two good counts to brandish rather than just one. But this is true whether the valid count charges a more serious crime than the invalid one or a crime that is as serious; only if it charges a less serious crime is there a strong reason to believe that the defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid.

The Seventh Circuit noted that its decision created a conflict with the Eighth Circuit's decision in *Johnson*. App. 5. Because of this, the panel circulated the opinion to the full court of appeals in advance of publication, and no judge had voted to hear the case en banc. *Id.*

## REASONS FOR GRANTING THE PETITION

As Judge Posner admitted, the Seventh Circuit's decision denying Lewis' petition for relief conflicts with the Eighth Circuit's decision in *United v. Johnson*. If Lewis had brought his appeal in the Eighth Circuit – the circuit in which he pled guilty – his petition for relief would have been granted under the Eighth Circuit's decision in *United States v. Johnson*. But Lewis had to bring his petition for relief in the Seventh Circuit. The two courts of appeal addressed the same question of law but came to opposite conclusions based on conflicting interpretations of *Bousley v. United States*. This Court's review is warranted because there is an irreconcilable split between the courts of appeal on an important and recurring issue of federal law, and because the Seventh Circuit's decision conflicts not only with the decision of another court of appeals, but also this Court's decision in *Bousley v. United States*.

Specifically, the Seventh Circuit erred when it concluded that *Bousley* "does not require that the charge that was dropped or forgone in the plea negotiations be more serious than the charge to which the petitioner pleaded guilty." App. 4. In fact, that is exactly what *Bousley* requires. In *Bousley*, this Court held that a petitioner, having established that he is actually innocent of the charge to which he pled guilty, must also establish his actual innocence of any forgone more serious charge: "In cases where the Government has forgone *more serious* charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." *Bousley*, 523 U.S. at 624 (emphasis added). By concluding that "it is enough that [the forgone charge] is as serious," App. 4, the court of appeals' erroneously imposed an additional burden on petitioners that *Bousley* never intended. Nothing in *Bousley* required petitioners like Lewis to establish actual innocence of all forgone charges that are either more serious or equal in seriousness to the charge to which they pled but were actually innocent. *Bousley* requires only that petitioners like Lewis establish their actual innocence of any forgone charge "more serious" than the charge to which they pled but were actually innocent. *Bousley*, 523 U.S. at 624.

This interpretation of *Bousley* was adopted by the Eighth Circuit in *United States v. Johnson*. In *Johnson* the question was the same as that presented here: whether under *Bousley* an earlier dismissed § 924(c) charge was "more serious" than a subsequent § 924(c) charge to which the petitioner pled but was actually innocent. The Eighth Circuit held that an earlier § 924(c) charge was not "more serious." It observed that "[e]ven if one § 924(c) charge can

be more serious than another § 924(c) charge, the dismissed charge in [the petitioner's] case related to earlier conduct, and thus, could not have received the enhanced penalty for a 'second or subsequent' gun conviction." 260 F.3d at 921. In other words, *Bousley* requires only that petitioners prove their actual innocence of any forgone more serious charge; and thus, the only issue under *Bousley* was whether one § 924(c) charge was more serious than the other. Because only a second or subsequent § 924(c) charge results in a mandatory enhanced penalty, a dismissed § 924(c) charge relating to previous conduct could not as a matter of law be "more serious" than a subsequent charge.

Indeed, the Seventh Circuit recognized this when it observed that had the situation been reversed and Lewis pled guilty to the earlier § 924(c) charge and the government had forgone the subsequent § 924(c) charge, then because the subsequent § 924(c) charge carried a mandatory twenty-year enhancement, the charge that was dropped would have been "more serious" than the one to which Lewis pled. App. 4. Having concluded that the second § 924(c) charge was the "more serious" charge, the court of appeals by logical implication conceded that the earlier § 924(c) charge was less serious. A subsequent § 924(c) charge cannot be "more serious" when viewed from one vantage point but only "as serious" when viewed from another.

In fact, the Seventh Circuit's subsequent conclusion that one § 924(c) charge can be "as serious" as another § 924(c) charge makes no sense under the statute. For under § 924(c)(1) a "second or subsequent" § 924(c) conviction resulted in a mandatory twenty-year enhancement – as a matter of law a second or subsequent § 924(c) charge

is more serious than an earlier § 924(c) charge having a five-year mandatory sentence. Under *Bousley*, Lewis had no burden to establish his actual innocence of any less serious charge to be entitled to relief. The Seventh Circuit erred when it misapplied *Bousley* and required him to do just that.

Finally, there is no reason for this Court to await further developments in the Seventh Circuit or other courts of appeal before reviewing the question presented. Again, if Lewis was in the Eighth Circuit his petition for relief would have been granted. But he is in the Seventh Circuit and so he must serve an additional five years in prison. This disparity alone warrants this Court's attention. Moreover, the question is recurring as *Bailey* applies retroactively, the government regularly files indictments having multiple § 924(c) charges, and there is no reason to conclude that the Seventh Circuit will in subsequent cases reconsider its decision; indeed, the court of appeals declined rehearing en banc knowing its decision conflicted with the Eighth Circuit's in *United States v. Johnson*. The split between the courts of appeal is obvious and will likely never be reconciled absent this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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**In the**
**United States Court of Appeals**
**for the Seventh Circuit**

---

No. 00-3040

DWIGHT B. LEWIS,

*Petitioner-Appellant,*

*v.*

T.C. PETERSON, Warden,

*Respondent-Appellee.*

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Appeal from the United States District Court
for the Central District of Illinois.
No. 00-1094-M IMM, *Judge*.

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ARGUED APRIL 9, 2003 – DECIDED MAY 27, 2003

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Before FLAUM, *Chief Judge*, and POSNER and KANNE, *Circuit Judges*.

POSNER, *Circuit Judge*. The petitioner, Dwight Lewis, was convicted in a district court in the Eighth Circuit, pursuant to a guilty plea based on a plea agreement that he had signed, of using a firearm to commit a federal drug offense, in violation of 18 U.S.C. § 924(c). The agreement provided for the dismissal of another section 924(c) charge, this one based on an incident that occurred before the incident that formed the basis of his guilty plea. The petitioner did not appeal his conviction, but he later filed a motion under 28 U.S.C. § 2255 to vacate it on the

ground that the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137, 150 (1995), rendered shortly after he had been convicted, showed that (as the government acknowledges) he was innocent of the section 924(c) charge to which he had pleaded guilty. The district court denied his motion before the Supreme Court held, in *Bousley v. United States*, 523 U.S. 614 (1998), that a person who was convicted before *Bailey* and failed to challenge his conviction by way of a direct appeal, thus forfeiting his normal right to mount a collateral attack on the conviction, *id.* at 621, can nevertheless get his conviction set aside by means of a collateral proceeding if he proves that he is innocent both of the section 924(c) offense of which he was convicted (the "actual innocence" requirement imposed on defaulters) and of any "more serious" charge that the government dropped or otherwise forwent in the course of plea negotiations. *Id.* at 623-24.

The idea behind this rule is that had the government foreseen *Bailey* it would not have dropped the charge and so the petitioner, who we know wanted to plead guilty, would probably have pleaded guilty to that charge instead, and if it was a more serious charge (or we add, no less serious a charge) he would probably have incurred a lawful punishment no less severe than the one imposed on him under the count to which he pleaded guilty, the count that he was later determined to be innocent of by virtue of the Court's interpretation of section 924(c) in *Bailey*. Of course, it could not be said with certainty that his punishment would have been the same. A defendant may want to plead guilty whether there are two counts in the indictment or one, but if he learns that one is invalid he may hold out for a better deal on the other, since, for example, he doesn't have to worry about consecutive sentences. This

is a possibility, surely, but to allow the defendant to use it to get off scot free would be to confer a windfall on him, as the government would not have dropped a good count in plea negotiations had it known that the remaining count was invalid, and if the dropped charge was indeed a good count, the defendant would not have escaped punishment had it not been dropped, punishment at least comparable to that imposed on the bad count.

After the decision in *Bousley*, Lewis filed a second collateral attack, this one a petition for habeas corpus in the district of his incarceration, which happens to be in our circuit, not the Eighth Circuit. 28 U.S.C. § 2241(d). He invoked the provision in 28 U.S.C. § 2255 that allows this maneuver if it "appears that the remedy by [section 2255] motion is inadequate or ineffective to test the legality of his detention." See *In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998). It was here. The petitioner could not have satisfied the criteria for filing a second section 2255 motion because he was not seeking relief on the basis of newly discovered evidence or a new rule of constitutional law, which are the only grounds for a second such motion. *Id.* at 610. Yet the combined effect of *Bailey* and *Bousley* is to establish that he was convicted of a nonexistent crime, a consequence that, as the *Bousley* decision makes clear, is a ground for collateral relief. Therefore, with the section 2255 route barred, he was entitled to proceed by way of habeas corpus. *In re Davenport*, *supra*, 147 F.3d at 610-12; *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997); cf. *Gray-Bey v. United States*, 209 F.3d 986, 989-90 (7th Cir. 2000) (per curiam). And so the district court assumed, but it went on to deny relief on the merits and the petitioner has appealed.

He concedes that had the section 924(c) offense that was dropped in the plea negotiations been committed after the section 924(c) offense to which he pleaded guilty was committed, then because a second such offense carried at the time an additional 20-year sentence, see 18 U.S.C. § 923(c)(1)(C)(i) (since amended to raise the addition to 25 years), the charge that was dropped would have been "more serious" than the one to which he pleaded. And since he cannot demonstrate his innocence of the dropped offense, he would in those circumstances be entitled to no relief. But, he argues, relying on *United States v. Johnson*, 260 F.3d 919, 921 (8th Cir. 2001) (per curiam), because the dropped offense occurred first, and a later offense cannot be used to enhance the punishment for an earlier one, the "more serious" criterion of *Bousley* has not been met. The dropped charge, the one that he cannot demonstrate he did not commit, was no more serious than the one to which he pleaded guilty and which he has shown that he did not (by virtue of *Bailey*'s interpretation of section 924(c)) commit.

We disagree with *Johnson*'s reading of *Bousley*. The logic of the *Bousley* opinion does not require that the charge that was dropped or forgone in the plea negotiations be more serious than the charge to which the petitioner pleaded guilty. It is enough that it is as serious. For if it is as serious, the petitioner would have gained little or nothing had the government and he realized that the charge to which he pleaded guilty was unsound. Had they realized this they would have switched the plea to the sound charge, and as long as it was an equally serious charge, as it was here, the punishment would probably have been the same, subject to our earlier acknowledgment that the government might drive a harder plea

bargain if it had two good counts to brandish rather than just one. But this is true whether the valid count charges a more serious crime than the invalid one or a crime that is as serious; only if it charges a less serious crime is there a strong reason to believe that the defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid. Thus the Court's reasoning does not support limiting the rule of *Bousley* to the case in which the dropped or otherwise forgone charge was more serious, rather than as or more serious, than the charge to which he pleaded guilty.

Because this decision creates a conflict with another circuit, the opinion was circulated to the full court in advance of publication, in accordance with 7th Cir. R. 40(e). No judge in regular active service voted to hear the case en banc. (Judge Coffey did not participate in the consideration of whether to hear the case en banc.)

AFFIRMED.

A true Copy:

Teste:

_____

*Clerk of the United States Court of Appeals for the Seventh Circuit*

**United States Court of Appeals**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

March 21, 2002

***By the Court:***

No. 00-3040

DWIGHT B. LEWIS
*Petitioner-Appellant,*

*v.*

T.C. PETERSON,
*Respondent-Appellee.*

Appeal from the United States District Court for the Central District of Illinois

No. 00-1094

Michael M. Mihm,
*Judge.*

**ORDER**

This court has reviewed Dwight Lewis's pro se brief and determined that the assistance of counsel and oral argument would materially advance the issues presented on appeal. Accordingly, the court, on its own motion, **ORDERS** that counsel be appointed to represent Lewis.

The briefs in this case should address, in addition to other issues that counsel believes need attention, these questions:

1. Whether Lewis is entitled to proceed under 28 U.S.C. § 2241 on his claim under *Bailey v. United States*, 516 U.S. 137 (1995), because his remedy under 28 U.S.C. § 2255 was "inadequate or ineffective to test the legality of his detention." More specifically, whether Lewis was given "a *reasonable* opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence," where he raised

a *Bailey* claim in his § 2255 motion but that claim was rejected based on a decision of the Eighth Circuit that was later reversed by the Supreme Court in *Bousley v. United States*, 523 U.S. 614 (1998). *See In re Davenport*, 147 F.3d 605 (7th Cir. 1998); *Gray-Bey v. United States*, 209 F.3d 986, 990 (7th Cir. 2000) (per curiam).

2. *Bousley* holds that a petitioner's showing of actual innocence must extend to any "foregone more serious charges" that were dismissed as part of the plea agreement. 523 U.S. at 624. Based on that statement, was the 18 U.S.C. § 924(c) charge that was dismissed as part of the plea agreement "more serious," and if so, is Lewis actually innocent of the dismissed § 924(c) charge?

An order designating counsel and setting a briefing schedule will follow. Proceedings in this appeal are therefore **SUSPENDED** pending further order of the court.

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| DWIGHT B. LEWIS, Petitioner, | ) | |
| v. | ) | Case No. 00-1094 |
| DAVID L. WINN, Warden, Respondent. | ) | |

**ORDER**

(Filed Jul. 12, 2000)

Before this Court is Petitioner, Dwight Lewis' ("Lewis"), Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. For the reasons stated herein, the Court DENIES the Petition [#1].

FACTUAL BACKGROUND

On July 18, 1995, Lewis pled guilty to one count of possession of cocaine base with intent to distribute (Count III) and one count of using and carrying a firearm in the commission of a drug related offense in violation of 18 U.S.C. § 924(c) (Count IV) in the United States District Court for the District of Nebraska. His plea agreement stipulated that while he was not pleading guilty to the other counts charged in the Indictment, the offense conduct of those counts would be considered relevant conduct for purposes of sentencing. On November 20, 1995, Lewis was sentenced at the bottom of the guidance range to 140 months' imprisonment on Count III and a consecutive term of 60 months' imprisonment on Count IV. He did not timely pursue a direct appeal.

Several months later, the United States Supreme Court issued its decision in *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501 (1995), which changed the definition of "use" under § 924(c) in this and other circuits. Specifically, that decision held that "use" in section 924(c) does not include mere possession, as had been the law of this circuit when [Lewis] was convicted." *In re Davenport*, 147 F.3d 605, 607 (7th Cir. 1998).

Within days of the issuance of the decision in *Bailey*, Lewis sought leave to pursue a late appeal, which was denied on December 27, 1995. He did not appeal the denial of this motion.

Lewis then filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 on October 15, 1996. His motion was denied on January 30, 1997, and his application of certificate of appealability was denied by the Eighth Circuit Court of Appeals on January 12, 1998.

Lewis has now brought this petition pursuant to § 2241 challenging his § 924(c) conviction. The matter is now fully briefed and ready for resolution. This Order follows.

## DISCUSSION

In his § 2241 Petition, Lewis asks this Court to vacate his conviction under § 924(c) in light of the United States Supreme Court's decision in *Bailey*. Section 924(c)(1) provides, in relevant part:

> Any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of

> the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to a term of imprisonment of not less than five years. . . .

18 U.S.C. § 924(c)(1) (emphasis added). In order to obtain a conviction under § 924(c), the Government must demonstrate "that the defendant 'used or carried' a firearm and that the use or carrying was 'during and in relation to' a drug trafficking crime." *United States v. Booker*, 73 F.3d 706, 708 (7th Cir. 1996), *citing Smith v. United States*, 508 U.S. 223, 113 S.Ct. 2050, 2053 (1993).

Prior to *Bailey*, the District of Columbia Circuit employed a "multifactor" test to determine whether the evidence in support of a § 924(c) conviction was sufficient. *Bailey*, 116 S.Ct. at 504. The "Multifactor" test weighed the sufficiency of a number of factors, e.g. accessibility of the firearm, proximity of the firearm to drugs, whether the firearm was loaded, the type of weapon, and expert testimony. *Id.* at 504-05. The "accessibility and proximity" test then replaced the "multifactor" test. *Id.* Under the new test, the evidence was sufficient to establish a 'use' when the defendant "puts or keeps the gun in a particular place from which one . . . can gain access to it if and when needed to facilitate a drug crime." *Id.* at 505. (Quotation marks omitted.) Finding that the District of Columbia Circuit's debate on this issue was taking place in other circuits, the Supreme Court granted certiorari. *Id.* The Supreme Court resolved inconsistencies between the circuits by clarifying the standard for satisfying the "use" prong of § 924(c); "use"

was defined to be "... an *active employment* of the firearm by the defendant." *Id.* (Emphasis in original.) "Use" includes "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

This Petition involves a collateral attack on Lewis' conviction and sentence, which would traditionally be brought pursuant to 28 U.S.C. § 2255. However, he previously pursued § 2255 relief and is now barred from pursuing further relief, under that section, as the case law has made it clear that his situation does not qualify for relief as a second or successive motion. *Gray-Bey v. United States*, 209 F.3d 986, 988-90 (7th Cir. 2000); *In re Davenport*, 147 F.3d at 610-11. Accordingly, he argues that his case qualifies as one of the few instances in which petitioners may seek relief under § 2241. *Id.* at 611-12.

However, unlike the situation addressed in *In re Davenport*, the change in the law as a result of *Bailey* occurred prior to Lewis' pursuit of a motion pursuant to § 2255. "A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion." *In re Davenport*, 147 F.3d at 611. Thus, it would at first appear that § 2255 was not inadequate or ineffective to afford necessary relief in Lewis' case, because Lewis had a reasonable opportunity to obtain judicial correction of any fundamental defect in his § 924(c) conviction when he filed his § 2255 motion in the district court nearly ten months after the law changed as a result of the decision in *Bailey*. The simple fact that his § motion was ultimately

denied does not entitle him to then avail himself of § 2241. Lewis responds that as he was convicted, sentenced, and filed his collateral motions in the Eighth Circuit prior to the time that the Supreme Court issued its decision reversing the Eighth Circuit's decision in *Bousley v. United States*, under which courts in that circuit had held that *Bailey* did not apply retroactively to overcome a procedural default, § 2255 was nevertheless ineffective to afford him the requisite relief. 523 U.S. 614, 118 S.Ct. 1604 (1998) (finding that *Bailey* was retroactively applicable).

Assuming that § 2255 was inadequate or ineffective to afford necessary relief in Lewis' case as a result of the district court and Eighth Circuit's application of a procedural bar imposed by the subsequently vacated *Bousley* decision, to obtain relief Lewis must still demonstrate that he is actually innocent in the sense that he is factually innocent of the § 924(c) offense for which he pled guilty. *Dejan v. United States*, 208 F.3d 682, 686 (8th Cir. 2000). This means that he "has the burden of showing that 'in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" of the § 924(c) charge. *Id.*, *citing Bousley*, 118 S.Ct. at 1611-12. If he makes this showing, he must also demonstrate that he is factually innocent of the second § 924(c) offense that was foregone by the Government as part of his plea bargain. *Dejan*, 208 F.3d at 686; *Bousley*, 118 S.Ct. at 1611-12.

Here, the relevant facts underlying the § 924(c() charge to which Lewis pled guilty are essentially as follows:

> [O]n July 28, 1994, Lewis was arrested at his residence at 4070 Spencer Street in Omaha, Nebraska. Approximately 62 grams of cocaine base were recovered from the residence along with a Lorcin, model L380, .380 semi-automatic pistol, with the magazine containing six live rounds of .380 ammunition. Two 'gram' scales, a cellular phone, pager and $1,300 in United States currency were also recovered from the residence.

(Presentence Report at ¶ A5.) Lewis states that the gun was found inside a bedroom of his home, he was arrested in his living room, and the cocaine was actually found outside of his residence; Respondent makes no effort to dispute Lewis' version of the facts underlying this conviction, and his version will therefore be accepted as true.

Following *Bailey*, it is clear that the facts underlying Count IV of the indictment do not constitute an active employment of the firearm by Lewis, as his possession does not even come close to "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Bailey*, 116 S.Ct. at 508. Nor does his possession qualify as a "carry," as the weapon was neither present on his person nor transported and within his reach, i.e., accessible. *United States v. Booker*, 73 F.3d 706, 709 (7th Cir. 1996); *United States v. Baker*, 78 F.3d 1241, 1247 (7th Cir. 1996); *United States v. Smith*, 80 F.3d 215, 221 (7th Cir. 1996); *United States v. Molina*, 102 F.3d 928, 930-31 (7th Cir. 1996). Thus, Lewis has met his burden with respect to the § 924(c) charge in Count IV to which he pled guilty.

However, in order to warrant habeas corpus relief, Lewis must also demonstrate that he is factually innocent of using or carrying a firearm with respect to the § 924(c) charge in Count II of the Indictment that was dismissed as part of his plea agreement. *Dejan*, 208 F.3d at 686; *Bousley*, 118 S.Ct. at 1611-12. The only factual information with respect to this count is provided by Lewis in his traverse, and again, as Respondent made no effort to offer any other version of the facts, Lewis' version will be accepted as true for purposes of this motion. The underlying facts, according to Lewis, are as follows:

> On May 14, 1994, petitioner and a female companion were sitting inside of his vehicle talking. The automobile was parked in the back of a private driveway where the petitioner worked as a construction worker. Petitioner and his companion began engaging in a sexual act while inside the vehicle. While still engaged in said conduct, an Omaha, Nebraska police officer pulled up on the couple and asked them to both step out of the car. After leaving the vehicle, the officer searched the it [sic] and found a Smith & Wesson .357 magnum revolver in the back passenger seat and cocaine in the trunk.

(Traverse at 5.)

As with the facts underlying the § 924(c) charge in Count IV, the facts underlying Count II do not constitute an active employment of the firearm by Lewis under *Bailey*. However, the Seventh Circuit has affirmed convictions under § 924(c) where "it is clear from the record that the actions of the defendant upon which the now-infirm 'use' charge is predicated necessarily constitute a 'carrying' of the firearm as that term is used

in that statute". *Medina v. United States*, 124 F.3d 204, 1997 WL 374856, at *2 (7th Cir. 1997), *citing United States v. Gonzalez*, 93 F.3d 311, 321 (7th Cir. 1996); *United States v. Cotton*, 101 F.3d 52, 56 (7th Cir. 1996).

In *Bailey*, the Supreme Court deliberately avoided redefining the scope of the "carry" prong of § 924(c). *Bailey*, 116 S.Ct. at 506-09; *Arango-Alvarez v. United States*, 134 F.3d 888, 891 (7th Cir. 1998). It only specified that "[t]he 'carry' prong . . . brings some offenders who could not satisfy the 'use' prong within the reach of the statute." *Bailey*, 116 S.Ct. at 509. The Seventh Circuit has since found that a defendant "carries" a weapon under § 924(c)(1) when the weapon is "on his person." *Booker*, 73 F.3d at 709. It has also concluded that "transporting a gun . . . within reasonable reach constitutes 'carrying' for purposes of § 924(c)(1)." *Baker*, 78 F.3d at 1247. The Supreme Court has also clarified that "carrying" may include the transportation or conveyance of a firearm in a vehicle. *Muscarello v. United States*, 524 U.S. 125, 118 S.Ct. 1911, 1914-16 (1998).

In summary, a defendant carries a gun when the weapon is (1) present on the defendant's person or (2) transported and within the defendant's reach, i.e., accessible. *Booker*, 73 F.3d at 709; *Baker*, 78 F.3d at 1247; *Smith*, 80 F.3d at 221; *Molina*, 102 F.3d at 930-31. A carrying conviction can also be based on a weapon being carried at some time prior to the arrest, even if the weapon is not within the immediate reach of the defendant at the time of arrest. *Wilson v. United States*, 125 F.3d 1087, 1094-95 (7th Cir. 1997).

Here, Count I of the Indictment charged Lewis with possession of crack cocaine with the intent to distribute.

Count II clearly charged that Lewis had used and carried a firearm in relation to the commission of the drug trafficking crime alleged in Count I, and Lewis agreed and stipulated that he had committed the offense conduct set forth in the dismissed counts as part of his plea agreement. Moreover, the facts as set forth by Lewis indicate that the firearm he transported in the back seat of the car was within his reach and in reasonably close proximity to the drugs being transported in the trunk of the same car, such as to have the potential to facilitate the drug trafficking offense he has admitted to perpetrating. *Wilson*, 125 F.3d at 1093.

> [T]here is little question that transporting a gun in a car within reasonable reach constitutes 'carrying' for the purposes of § 924(c) . . . . [P]ossession of the firearm coupled with the affirmative act of transporting it during and in relation to a drug trafficking crime . . . . precipitates liability under [the statute].

*United States v. Martinez*, 169 F.3d 1049, 1055 (7th Cir. 1999), *citing Baker*, 78 F.3d at 1247.

Thus, the Court finds that the facts underlying the weapons charge in Count II of the Indictment demonstrate a "carrying" in relation to a drug trafficking offense sufficient to sustain the § 924(c) conviction and sentence. Accordingly, Lewis has failed to meet his burden of showing that he is factually innocent of both the § 924(c) charge to which he pled guilty and the § 924(c) charge that was dismissed as part of his plea agreement. He is therefore not entitled to habeas corpus relief.

## CONCLUSION

For the reasons stated herein, the Court DENIES Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 [#1]. This case is now terminated.

ENTERED this 12th day of July, 2000.

/s/ Michael M. Mihm
Michael M. Mihm
United States District
Judge

AO450 (Rev. 5/83) Judgment in a Civil Case

United States District Court
CENTRAL DISTRICT OF ILLINOIS

**JUDGMENT IN A CIVIL CASE**

**DWIGHT B. LEWIS**

**Petitioner**

**vs.** **Case Number: 00-1094**

**DAVID L. WINN**

**Respondent**

(Filed Jul. 12, 2000)

☑ **DECISION BY THE COURT.** This action came before the Court. The issues have been heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that Petition for writ of habeas corpus pursuant to 28 U.S.C. §2241 is DENIED.

ENTER this 12th day of July, 2000

/s/ John M. Waters
JOHN M. WATERS, CLERK

/s/ W. Willett
BY: DEPUTY CLERK

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| DWIGHT B. LEWIS, Petitioner, | ) | |
| v. | ) | Case No. 00-1094 |
| DAVID L. WINN, Warden, Respondent. | ) | |

**ORDER**

(Filed Jul. 28, 2000)

Before this Court is Petitioner, Dwight Lewis' ("Lewis"), Motion for Reconsideration from the denial of his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale de Credit v. CBI Industries*, 90 F.3d 1264, 1269 (7th Cir. 1996). Furthermore, it is not appropriate to argue matters that could have been raised in prior motions or rehash previously rejected arguments in a motion to reconsider. *Id.* at 1270.

The Court denied Lewis' § 2241 petition after finding that although he demonstrated factual innocence with respect to the § 924(c) offense for which he pled guilty, he failed to demonstrate that he was factually innocent of the second § 924(c) offense that was foregone by the Government as part of his plea bargain, as required under *Dejan v. United States*, 208 F.3d 682, 686 (8th Cir. 2000) and *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 1611-12 (1998). Thus, he was unable to meet his burden of demonstrating that he is factually innocent of both the

§ 924(c) charge to which he pled guilty and the § 924(c) charge that was dismissed as part of his plea agreement, as required to obtain relief. *Id.*

Lewis first criticizes this finding as somehow internally inconsistent. However, his criticism is based on his fundamental misunderstanding of the finding itself. The Court did not, as he mistakenly suggests, change its finding with respect to his ability to demonstrate actual innocence of the § 924(c) charge to which he pled guilty. However, having failed to establish actual innocence with respect to the second § 924(c) charge, he necessarily did not establish his actual innocence with respect to both § 924(c) charges. His argument in this respect is therefore frivolous.

The remainder of the Motion for Reconsideration is dedicated to rehashing Lewis' argument that he was actually innocent of the second § 924(c) charge, because the facts did not demonstrate that he possessed the firearm during or in relation to a drug trafficking crime. However, this argument ignores the fact that as part of his plea agreement, Lewis stipulated that he was guilty of the offense conduct as charged in Count I of the Indictment for possession of crack cocaine with the intent to distribute. The § 924(c) charge in Count II clearly alleged that Lewis had used and carried a firearm in relation to the commission of the drug trafficking crime alleged in Count I. Thus, his plea agreement stipulation that he had committed the offense conduct set forth in these counts, in conjunction with the facts set forth in his traverse, plainly establishes that he carried the gun in connection with the drug trafficking crime of possession of crack cocaine with intent to distribute, and his Motion for Reconsideration is without merit.

## CONCLUSION

For the reasons set forth herein, Lewis' Motion for Reconsideration [#12] is DENIED.

ENTERED this 28th day of July, 2000.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

Supreme Court, U.S.
FILED
OCT 24 2003
OFFICE OF THE CLERK

No. 03-298

# In the Supreme Court of the United States

DWIGHT B. LEWIS, PETITIONER

*v.*

T.C. PETERSON, WARDEN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether a federal inmate who was barred from filing a second or successive motion under 28 U.S.C. 2255 to challenge his conviction for using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c), under *Bailey* v. *United States*, 516 U.S. 137 (1995), is entitled to relief under 28 U.S.C. 2241 in the absence of a showing that he is actually innocent on a Section 924(c) count carrying an equal penalty that was dismissed as a result of a plea agreement.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 6 |
| Conclusion | 10 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Bailey* v. *United States*, 516 U.S. 137 (1995) | 2, 3 |
| *Bousley* v. *Brooks*, 97 F.3d 284 (8th Cir. 1996), rev'd, 523 U.S. 614 (1998) | 3 |
| *Bousley* v. *United States*, 523 U.S. 614 (1998) | 2, 4, 7, 8 |
| *Dorsainvil, In re*, 119 F.3d 245 (3d Cir. 1997) | 5 |
| *Murray* v. *Carrier*, 477 U.S. 478 (1986) | 4 |
| *Reyes-Requena* v. *United States*, 243 F.3d 893 (5th Cir. 2001) | 5 |
| *United States* v. *Barrett*, 178 F.3d 34 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000) | 5 |
| *United States* v. *Johnson*, 260 F.3d 919 (8th Cir. 2001) | 6, 9, 10 |


Statutes:


| | |
|---|---|
| 18 U.S.C. 924(c) | *passim* |
| 18 U.S.C. 924(c)(1) | 9 |
| 21 U.S.C. 841(a)(1) | 1, 3 |
| 28 U.S.C. 2241 | 2, 4 |
| 28 U.S.C. 2255 | 2, 3, 4, 5, 9 |

# In the Supreme Court of the United States

No. 03-298

DWIGHT B. LEWIS, PETITIONER

*v.*

T.C. PETERSON, WARDEN

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 329 F.3d 934.

### JURISDICTION

The judgment of the court of appeals was entered on May 27, 2003. The petition for a writ of certiorari was filed on August 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After entry of a guilty plea in the United States District Court for the District of Nebraska, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3), and using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)

(Count 4). He was sentenced to 140 months of imprisonment on Count 3, and to a mandatory consecutive 60-month term of imprisonment on Count 4. Petitioner did not timely appeal his convictions.

Petitioner subsequently brought a motion under 28 U.S.C. 2255 challenging his firearm conviction under this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), which was rendered shortly after he had been convicted. The district court denied his motion, and the court of appeals denied petitioner a certificate of appealability. Following this Court's decision in *Bousley* v. *United States*, 523 U.S. 614 (1998), petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the United States District Court for the Central District of Illinois challenging his Section 924(c) conviction. On July 12, 2000, the district court denied the petition (Pet. App. 8-17), and the court of appeals affirmed. *Id.* at 1-5.

1. On May 14, 1994, petitioner and a female companion were engaging in sexual conduct while parked in the driveway of a construction site where petitioner was working. A police officer pulled up and asked them to step out of the car. The officer searched the car and found a .357 magnum revolver in the back passenger seat and cocaine in the trunk of the car.

On July 28, 1994, petitioner was arrested at his Omaha, Nebraska residence. Gov't C.A. Br. 3. The police recovered a .380 semiautomatic pistol in the bedroom and 63 grams of cocaine just outside the residence. On September 19, 1994, petitioner was arrested in possession of 3.5 grams of crack cocaine. On October 30, 1994, petitioner was arrested in possession of 10.17 grams of crack cocaine. Pet. 4.

A grand jury sitting in the District of Nevada returned an indictment that charged petitioner with

possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 1); three counts of possession of crack cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 5 and 6); and two counts of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c) (Counts 2 and 4). The firearm offense charged in Count 2 was based on the events of May 14, 1994, and the firearm offense charged in Count 4 was based on the events of July 28, 1994. Pursuant to a plea agreement, petitioner entered pleas of guilty to Counts 3 and 4 of the indictment in return for the dismissal of the remaining counts. He was sentenced to 140 months of imprisonment on Count 3, and to a consecutive five-year term of imprisonment on Count 4. Petitioner did not timely appeal his convictions. Gov't C.A. Br. 4.

2. Several months after his convictions, this Court held in *Bailey* v. *United States*, 516 U.S. 137 (1995), that a conviction for use of a firearm under Section 924(c) "requires evidence sufficient to show an *active employment* of the firearm by the defendant." *Id.* at 143. Shortly thereafter, petitioner unsuccessfully sought leave to pursue a late appeal. Pet. App. 9. On October 15, 1996, petitioner filed a petition for post-conviction relief pursuant to 28 U.S.C. 2255, arguing that *Bailey* mandated that his firearm conviction (Count 4) be vacated. Relying on *Bousley* v. *Brooks*, 97 F.3d 284 (8th Cir. 1996), the district court denied the petition, ruling that petitioner had procedurally defaulted the claim by failing to raise it on direct appeal. The court of appeals denied petitioner a certificate of appealability. Pet. App. 1-2; Gov't C.A. Br. 5-6.

On May 18, 1998, this Court reversed the Eighth Circuit's decision in *Bousley*, holding that *Bailey* applied

retroactively to cases on collateral review. *Bousley* v. *United States*, 523 U.S. 614 (1998). The Court held in *Bousley* that a defendant could collaterally attack under Section 2255 a plea-based Section 924(c) conviction if he could demonstrate that a procedurally defaulted constitutional error in his plea colloquy "has probably resulted in the conviction of one who is actually innocent." *Id.* at 623 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986)). In describing the extent of a prisoner's burden in establishing his actual innocence, the Court stated: "In cases where the Government has forgone more serious charges in the course of plea bargaining, [a] petitioner's showing of actual innocence must also extend to those charges." *Id.* at 624.

3. On March 13, 2000, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241 in the United States District Court for the Central District of Illinois, the district of his incarceration. The Section 2241 petition challenged petitioner's Section 924(c) conviction on the ground that the conduct underlying that conviction did not amount to the requisite "use" of a firearm as contemplated by *Bailey*. Gov't C.A. Br. 6-8. Under 28 U.S.C. 2255, a court may entertain a habeas petition under Section 2241 if "it appears * * * that the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of his detention." The district court assumed that Section 2241 relief was available to petitioner because the remedy provided in Section 2255 was inadequate or ineffective to test the validity of petitioner's conviction. Pet. App. 9-12. Reaching the merits, the court denied the petition on the ground that petitioner, although establishing his innocence on the Section 924(c) to which he pleaded guilty, had failed to show that he was

actually innocent of the Section 924(c) offense (Count 2) that was dismissed as part of his plea agreement. The court explained that the facts underlying Count 2 constituted a valid "carrying" of a firearm during the course of and in relation to a drug trafficking offense. *Id.* at 12-16; Gov't C.A. Br. 8-9.

4. The court of appeals affirmed. Pet. App. 1-5. The court found, as the government had conceded (Gov't C.A. Br. 13-16), that petitioner was entitled to proceed by way of habeas corpus. The court reasoned that Section 2255 relief was inadequate in this case because "petitioner could not have satisfied the criteria for filing a second section 2255 motion because he was not seeking relief on the basis of newly discovered evidence or a new rule of constitutional law, which are the only grounds for a second such motion." Pet. App. 3. The court found that because the combined effect of *Bailey* and *Bousley* was "to establish that [petitioner] was convicted of a nonexistent crime" (which was a ground for collateral relief), and because the Section 2255 route was barred, "[petitioner] was entitled to proceed by way of habeas corpus." *Ibid.*[*]

The court of appeals affirmed the district court's denial of habeas corpus relief, however, because petitioner had failed to establish his actual innocence on the Section 924(c) count that had been dismissed pursuant to the plea agreement. The court rejected petitioner's claim that, under *Bousley*, petitioner did not have to

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[*] Other courts have similarly held that in limited situations such as those presented here, a prisoner is entitled to proceed by way of habeas corpus. See, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 903 (5th Cir. 2001); *United States* v. *Barrett*, 178 F.3d 34, 51-52 (1st Cir. 1999), cert. denied, 528 U.S. 1176 (2000); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997).

establish his innocence on the dismissed Section 924(c) charge because it was not "more serious" than the Section 924(c) count to which he pleaded guilty. Pet. App. 4-5. The Court found that the logic of *Bousley* "does not support limiting [its rule] to the case in which the dropped or otherwise forgone charge was more serious, rather than as or more serious, than the charge to which [petitioner] pleaded guilty." *Id.* at 5. The court explained:

> For if it is as serious, the petitioner would have gained little or nothing had the government and he realized that the charge to which he pleaded guilty was unsound. Had they realized this they would have switched the plea to the sound charge, and as long as it was an equally serious charge, as it was here, the punishment would probably have been the same * * *. [O]nly if [the dropped charge] charges a less serious crime is there a strong reason to believe that the defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid.

*Id.* at 4-5.

## ARGUMENT

Petitioner contends (Pet. 8-11) that the court of appeals' decision conflicts with the decision of the Eighth Circuit in *United States* v. *Johnson*, 260 F.3d 919 (2001) (per curiam), on the question whether a prisoner who collaterally attacks a plea-based Section 924(c) conviction must establish his actual innocence of a dismissed Section 924(c) charge that would not have carried a longer sentence than the challenged Section 924(c) count. Although the decision below reached a different result than *Johnson* based on similar facts,

there is no square conflict between the two decisions that would warrant this Court's plenary review.

1. In *Bousley*, this Court held that a defendant who pleaded guilty to a Section 924(c) charge before *Bailey* may raise a collateral claim that the plea was entered without a correct understanding of the elements of the offense, notwithstanding his procedural default of that claim, if he could make an adequate showing of actual innocence. In describing the extent of a prisoner's burden in establishing his actual innocence, the Court stated: "In cases where the Government has forgone more serious charges in the course of plea bargaining, [a] petitioner's showing of actual innocence must also extend to those charges." 523 U.S. at 624.

The court of appeals in this case correctly applied *Bousley* to require petitioner to establish his actual innocence on the Section 924(c) charge that the government dismissed in exchange for petitioner's guilty plea to the invalid Section 924(c) charge. Petitioner has failed to show his actual innocence of the Section 924(c) count that the government dropped in its plea agreement. Pet. App. 4, 16. Petitioner accordingly should not be relieved from his procedural default and permitted to challenge the Section 924(c) count to which he pleaded guilty. Had the government known about *Bailey* at the time of petitioner's guilty plea, or had petitioner raised a *Bailey*-type objection at the time, the government could have requested petitioner to plead guilty to the forgone count as to which there was adequate evidence, or the government could have proceeded to trial on that count. As the court of appeals explained, if a forgone count in such situations is an equally serious charge, the punishment probably would have been the same. "[O]nly if [a dropped charge is] a less serious crime is there a strong reason to

believe that [a] defendant was punished more severely by virtue of having pleaded guilty to the count later learned to be invalid." *Id.* at 5. In short, petitioner should not be allowed to raise a procedurally defaulted challenge to a Section 924(c) sentence that he bargained for when he actually committed a Section 924(c) offense that most likely would have resulted in the same punishment had it not been dismissed in exchange for his plea.

*Bousley* itself contemplated that a defendant collaterally attacking a Section 924(c) conviction would not only have to establish his innocence on that offense, but also on any other charge that might have resulted in equal or greater punishment that the government had forgone during plea negotiations. The Court there rejected the contention that the defendant was required to show not only that he was actually innocent of "using" a firearm—the conduct with which he was charged—but also actually innocent of "carrying" a firearm:

> [T]here is no record evidence that the Government elected not to charge [defendant] with "carrying" a firearm in exchange for his plea of guilty. Accordingly, petitioner need demonstrate no more than that he did not "use" a firearm as that term is defined in *Bailey*.

523 U.S. at 624. That language clearly contemplates that if the government forgoes a valid "carry" charge in favor of an invalid "use" charge, a defendant should have to establish his innocence on the carry charge—an offense as serious as, but not more serious than the use charge—in order to obtain relief.

2. The court of appeals' decision does not squarely conflict with the Eighth Circuit's per curiam decision in

*Johnson*. In that case, the defendant pleaded guilty to a Section 924(c) count based on the theory later rejected in *Bailey* partly in exchange for the dismissal of another Section 924(c) count. Following *Bailey*, the defendant moved under 28 U.S.C. 2255 to vacate his Section 924(c) conviction. The district court denied the motion, and the court of appeals remanded for further consideration in light of *Bousley*. After the district court granted the motion without holding an evidentiary hearing, the court of appeals again remanded for an evidentiary hearing to determine whether the dismissed Section 924(c) charge was more serious than the one to which the defendant had pleaded guilty.

On remand, the district court found that the dismissed Section 924(c) was not more serious than the one to which defendant had pleaded guilty. In affirming, the Eighth Circuit rejected the specific argument advanced by the government that the dismissed Section 924(c) was *more* serious than the one to which the defendant pleaded guilty because a "second or subsequent" Section 924(c) conviction was punishable by a mandatory 20-year consecutive term of imprisonment (18 U.S.C. 924(c)(1)). The court explained that, "[e]ven if one [Section] 924(c) charge can be more serious than another [Section] 924(c) charge, the dismissed charge in [the defendant's] case related to earlier conduct, and thus, could not have received the enhanced penalty for a 'second or subsequent' gun conviction." 260 F.3d at 921.

The decision below interpreted the Eighth Circuit's decision as not requiring a defendant to show his actual innocence on a dismissed Section 924(c) charge that is *as* serious as the invalid count. Pet. App. 4-5. The Eighth Circuit in *Johnson*, however, did not address the precise question resolved by the court of appeals in

this case, *i.e.*, whether a forgone count carrying a penalty of *equal* severity to an invalidated count should be treated in the same manner as a "more serious" offense of which the defendant must show his actual innocence. The Eighth Circuit expressly did not decide whether for purposes of *Bousley* "one [Section] 924(c) charge can be more serious than another [Section] 924 charge," 260 F.3d at 921, and held only that the forgone Section 924(c) count in that case was not "more serious." Because *Bailey*-based collateral challenges to Section 924(c) convictions are a limited and diminishing class, the issue may not arise in the future (and thus would lack the prospective importance needed to warrant this Court's attention). But if the Eighth Circuit does address the precise issue addressed below, it may well be influenced by the reasoning of the Seventh Circuit in this case. Accordingly, review by this Court at the present time is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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